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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 364

MARY LEE LAKE AND LEWIS W. LAKE,
HER HUSBAND, PLAINTIFFS BELOW,
Appellants,

V.

POTOMAC LIGHT AND POWER COMPANY,
DEFENDANT BELOW,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

LEWIS W. LAKE,
Wardensville, West Virginia 26851
For Appellants.

(No counsel appeared for Appellee.)

The Daily Record Co., Baltimore, Md. 21203

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STATEMENT OF THE CASE

The above titled case was brought in the Circuit Court of Hardy County, West Virginia, July 1959 and after many delays, hearings, trials and retrial, a jury was paneled and after hearing the evidence, returned a verdict, February 27, 1967, that the defendant was not trespassing on the plaintiffs' land and on February 28, 1967, the court entered a judgment accordingly, this, though the direct admissions of defendant, admitted defendant was trespassing on plaintiffs' land.

Plaintiffs appealed, in due form and timely, to the Supreme Court of Appeals of West Virginia to reverse said judgment because it was contrary to defendant's own admissions, and order the lower court to enter a proper judgment.

On February 6, 1968, the Clerk of the Supreme Court of Appeals officially notified the plaintiffs "The Court yesterday, February 5, 1968, refused the appeal in the above styled case. Very truly yours, Kenneth E. Hines, Clerk." Written on official Supreme Court of Appeals paper.

On February 14, 1968, plaintiffs filed a petition asking the said Court to reconsider and review its said refusal to hear the appeal requested. On March 4, 1968, the Court through the office of its Clerk formally advised counsel "The Court entered an order today not to consider your petition (February 15, 1968) to reconsider the former refusal of this Court of an appeal (to petition filed December 27, 1967), to a judgment of the Circuit Court of Hardy County entered on April 28, 1967, because such petition to reconsider was filed too late, or more than eight months from judgment of the trial court. Very truly yours, Kenneth E. Hines, Clerk."

This is the formal way, I am advised, that the Court acts on such matters. No written opinion was filed.

Under the judgment, the plaintiffs land is taken without due process of law, equal protection of the law, and just compensation, contrary to the 5th and 14th Amendments to the U. S. Constitution, which the plaintiffs invoked in the Circuit Court of Hardy County and in the petition for an appeal and their petition to reconsider its refusal to grant an appeal, which were ignored or brushed aside without comment, except a flat refusal in both instances.

THE APPEAL is taken separately and collectively from the three judgments above stated but particularly the judgment of March 4, 1968, which was final in the State courts. The plaintiffs believe Section 1257(2) U.S.C. 28 confers jurisdiction on this court over this appeal.

The plaintiffs say West Virginia Constitution, Article 3, Sections 9 and 10, are similar to the United States 5th and 14th Amendments to Constitution and Section 1461 (5) W. Va. C. limits and prohibits State from taking private property except by agreement and condemnation.

The verdict of the jury was for the defendant, rendered February 27, 1967, that the defendant was not trespassing on plaintiffs' land. Judgment of the court was entered on the verdict, February 28, 1967, thus the plaintiffs' land was taken without due process of law; condemnation and just compensation contrary to the 5th and 14th amendments of the Constitution of the United States and Secs. 9 and 10, Art. 3, Constitution of West Virginia, and State Code, Sec. 1461 (5) for Right of Eminent Domain.

QUESTIONS PRESENTED

The following questions are presented:

A. Can a judge enter a judgment on the verdict of a jury that constitutes a taking of private property by awarding its use to another, contrary to the 5th and 14th Amendments to the Constitution of the United States — due process of law, just compensation, equal protection of the law?

B. Can the verdict of a jury override the provisions directly or indirectly of the 5th and 14th United States constitutional amendments by ignoring due process of the law, equal protection of the law, just compensation and eminent domain?

C. Has the effect of the three judgments, singly and collectively been a taking of the plaintiffs' private property for public use contrary to the 5th and 14th Amendments of the Constitution of the United States without due process of law, without just compensation, without condemnation, and the right of appeal as per the judgment of the Supreme Court of Appeals of West Virginia, re Lake vs. Potomac Ligh. & Power Co. entered March 4, 1968, and the Constitution of West Virginia, Art. 3, Secs. 9 and 10, a reiteration of the Federal Constitution.

The Defendant, Its Witnesses and Counsel's Admissions Warranted A Verdict For the Plaintiffs.

The verdict of the lower court was not supported by an item of evidence, nor by a denial of the trespass, but on the contrary, the admissions of all of the defendant's witnesses was that the plaintiffs owned the land and that the defendant's equipment was on it.

Defendant's Stipulation That Plaintiffs Own The Land.

At the start of the trial Counsel for defendant formally made the following stipulation; "The defendant stipulates that the plaintiffs own the land described in the plaintiffs amended bill of complaint as described therein, *supra*, p. 1.

Defendant's Witnesses Admissions.

The following represent the important defendant officers and witnesses: Robert W. Baker professional surveyor, specially employed for this case by defendant (2, pp. 16, 17),* Mr. Gamble, clerk Hardy County Court, keeper of the land

* Unless otherwise designated, all references (p. ——), (2, p. ——) are to the Transcript of Testimony (in two parts).

records of the county (p. 49), Mr. Hammon, chief engineer and executive officer of defendant (pp. 107, 108, 109, 110); Mr. Norris, chief superintendent of line construction (pp. 67, 68). Mr. Hammon and Mr. Norris personally conducted the erection of the power poles and equipment on plaintiffs' property and the accompanying equipment and its location, measuring 13 feet on plaintiffs' land (p. 63).

Mr. Hammon said he measured 20 feet from the center of the 14 foot Hardy Winchester Pike, an unimproved dirt road, to a point (13 feet) on plaintiffs' land, and drove the stakes for the poles (p. 110), that the plaintiffs refused to consent to the installation, but forbid it, and the defendant had maintained its equipment in that position ever since, against plaintiffs' objection, and that the defendant refuses to move their equipment.

Mr. R. W. Baker, defendant special surveyor said he had surveyed and ran the lines of plaintiffs' property, he identified the plaintiffs' land in pictures (Plaintiffs' exhibits O and P), in evidence and that the pole shown was the defendant's and described its location on plaintiffs' land and measures the pole to be 20 feet from the center of the pike (2, p. 14). On cross-examination he was asked by Mr. Lake, "Where was that pole? A. On your property on the north side of Route 55 looking toward Wardensville" (2, p. 16).

Mr. Norris said on cross-examination, "Mr. Lake I knew Mrs. Lake owned that property, but a local state road employee said the state had a 40 foot right of way." Plaintiff moved to strike it out, but the judge said it did not prove or disprove title. Witness said he got his information about the road from a highway engineer (pp. 72, 73).

Mr. Gamble said the records of his office disclosed Mrs. Lake's deed showed no condemnation, deed, easement or part to be intact the same as the day it was filed.

Protection of the U. S. Constitution

These statements the plaintiffs feel are serious but were true though meaningless to the jurors in this case as their verdict showed. Was the verdict according to the evidence? That is the oath the jurors took, that the verdict would be according to the evidence. The question is have the plaintiffs been denied the protection of the 5th and 14th Amendments of the Constitution of the U. S.? As this is a question of fact, and as the 5th and 14th Amendments to the U. S. Constitution does not require legal construction, but, facts of constitutional violation and the elements that qualified the jurors by their oath, to render a true verdict according to the evidence, the matter that confronts this Court is, did the jury intentionally or by any other uncontrollable impulse violate that oath and thereby deprive the plaintiffs of their constitutional rights? Which no one can deny as the matter stands they have been deprived of their land by brute force.

The plaintiffs respectfully submit their rights were violated. First by the judge of the Circuit Court of Hardy County who refused to instruct the jury that their verdict must be for the plaintiffs, based on the complete failure of evidence of the defendant to disprove its invasion of the plaintiffs land (2, p. 21, 22), but in the absence of this, all of their witnesses confirmed the defendants trespassed on plaintiffs' land; defendants witnesses, R. W. Baker, Hammon, Norris, Jordon, and clerk of the court Gamble. All of these things were before the circuit judge he said a dozen times the only title in that land is the Lakes.

Quoted Evidence of the Trespass

It is the intention of your orator to show the miscarriage of justice in the Circuit Court of Hardy County, you have been told in summary words but I now give you the

quoted evidence of the defendant's own witnesses, not implied, but by their direct statements, word for word, and the stipulation of defendant's counsel and the rulings of the judge from the first instance of the trial and the refusal of the judges of the Supreme Court of Appeals of West Virginia to grant the plaintiffs' petition for appeal and its final judgment refusing to grant the plaintiffs' petition to reconsider its judgment denying the plaintiffs' request for an appeal. The same breach of the U. S. Constitution applies to the three judgments.

The plaintiffs say they do not believe the misconception of an erroneous verdict of a jury, superinduced by unsupported prayers and a barrage of conclusions of law, without confirmation, that the defendant's equipment is on a proposed state road, to be 40 foot in width but which has never been accomplished, that is on 13 feet of the front of plaintiffs' property and a 10 foot right of way of the Town of Wardensville without mentioning where has the jury the power to nullify the protection the 5th and 14th Amendments of the U. S. Constitution guarantees to its citizens?

No jury is vested with such power. Such a thought is monstrous, but your Honors are here confronted with it. The lower court admonished counsel for defendant (p. 89). "That does not prove title yet," speaking of the alleged state 40 foot right of way.

(p. 80) Baker. State Road Survey 1929, Plaintiffs' Ex. 4, Defendant direct examination:

> "A. It shows the plan which is supposed to be the construction line in front of Lake property.
>
> Q. What does it show with reference to a highway in front of Lake property? A. It shows the plan of the road to be constructed pass the Lee property and through the main street of Wardensville.
>
> Q. What width does plan show of the highway in front of Lake property? A. About 40 feet."

This gives the court a perfect idea of the defendant's proof of a 40 foot right, submitted in 3 prayers to decide in proof of a 40 foot right of way.

As Baker had just said it was a plan for a proposed road to be constructed, the 40 foot could only refer to the proposed road.

The defendant contends, and its counsel persists that the State has a 40 foot right of way in front of plaintiffs' land; but the plaintiffs say, without any support from the evidence, and defendant's stipulation, how is it possible in view of the stipulation, that the plaintiffs own the land described in this amended bill of complaint which says the first boundary line described in the original 1878 deed, from which the description in the amended bill of complaint is copied says, "beginning at a large rock in the middle of a drain in the original line of the entire tract, on the west side of said pike (the State says in its 1929 survey is only 14 feet wide) thence N. 77 degrees W. 260 feet (I reiterate, "on the west side of said pike"), bearing in mind that only 2 sides of the triangular lot are concerned with the encroachment, the second line is as follows: ". . . a line in said drain, now a drive-way, drawn N. 41½ degrees W. from place of beginning . . ." All the probative evidence and the 1929 survey of the State Road Commission of their road, Hardy Winchester Pike, shows the pike to be 14 feet wide, see confirmation in this case before the Supreme Court of Appeals of W. Va., opinion by Judge Browning, 150 W. Va. 641 ". . . the state road survey of 1929 shows the Hardy Winchester Pike to be only 14 feet in width, there is no record of any proceeding by which the State acquired a larger right of way." "The judgment of November 25, 1964, is reversed and set aside . . . Reversed and remanded."

This court will note that the 1960 alleged state road permit was obtained subsequent to July 16, 1959, the date suit was filed. No permit can operate as a deed.

Uniform Declaratory Judgment Proceeding,

"All matters subsequent will be disregarded."

"Fact existing at time proceeding was commenced control." *S. Charleston v. Board of Education* (W. Va.) 80 S.E. 2d 880 (W. Va.)

But the question was raised by defendant that State has a 40 foot right of way — it is up to it to prove title and that the defendant's equipment is not on plaintiffs' land. The stipulation that plaintiffs own the property described in their complaint (p. 1), counsel for defendant has incessantly tried to destroy. The way he pursued has been to create a fictitious 40 foot right of way in the Hardy Winchester Pike extending over plaintiffs' boundary 13 feet, but the first obstruction to his efforts has been the uncontradicted stone by the side of the pike the place of beginning, and then by the side of the etc. its description and course originated in the case in the deed dated 1878 to Mrs. Lake's grandfather, James R. Baker, it was confirmed, in a questionable manner in the excluded 1918 plat (pp. 73, 74, 75), I say questionable manner because defendant's counsel from then on treated it as having been admitted in evidence to show a 40 foot right of way in State Road. The court by turning to the complaint, will see there is no mention of this 1918 plat within the "as described" boundary of the stipulated property, but neither the description nor the ruling of the court deterred the defendant. Next came the denial by the State 1929 survey which says its right of way is the 14 foot Hardy Winchester Pike. This the Supreme Court of Appeals of W. Va. confirmed, *supra.* The opinion stated the state road had only a 14 foot width. This sums up that the defendant should be held to its stipu-

lation that plaintiffs owned the property to the side of the 14 foot pike. Plaintiffs feel this alone above quotations of the witnesses testimony entitles them to an instructed verdict independent of any other assistance which is abundantly supplied. The judge: the only title is the "Lakes", there is no evidence of any title in the state road, the town, or defendant.

Further, in connection with same matter:

The following shows the errors of the judge in his ruling, allowing such statements to be considered by the jury to establish a title or right of way in the state or town, the court's answer to plaintiffs' objection was usually, "It doesn't prove or disprove title yet." Plaintiffs say if this is a meaningless statement it should have been excluded.

The cross-examination of R. W. Baker, professional surveyor for defendant, admits the trespass, but the defendant counsel's continual assertions of the existence of a 40 foot right of way in front of plaintiffs' property, which the court should have ordered him to stop.

With reference to 1960 permit, the defendant's witness stated these papers were the franchise of the old firm that served Wardensville until Potomac Edison took over (p. 73). Counsel accepted Mr. Hamilton's word but the papers later turned out to be an agreement concerning title to real property different from what counsel stated. The papers were offered in evidence by defendants, was not objected to in the first instance because defendants failed to explain them properly. The plaintiffs understood they were the ordinary contract of the power company to sell its current to local citizens. The witness stated (p. 73): ". . . they were the franchise and the purchase of the old firm that served Wardensville until Potomac Edison took over." Defendant

began to question witness about them, concerning rights of way (p. 74):

> "(Lake) I object for the reason that you can't take a permit from some person and let them tell you that they own the right of way over another man's property and that constitutes title to a right of way.
>
> (Court) Objection is sustained until it is established the state road owns the right of way which has not been done as yet."

Counsel handed witness another paper and asked what it was.

> "A. Paper from the state road commission showing they do have a right of way.
>
> (Lake) Let me see the paper before you start to say it shows the right of way. It is supposed to be a copy of a record, a public record (p. 74), instead it is a statement of what a man thinks (p. 75).
>
> (Court) The objection is sustained. You prove your right of way by deed.
>
> (Court) It may be vouched. Mark permit Defendant Ex. C. and show the objection is sustained."

This sustained objection is specially directed to Your Honors' attention as the defendants' prayers 3, 4 and 7 treat the alleged state 40 foot right of way as being admitted evidence, instead of having been rejected. (p. 74, 75)

> "(Lake) I haven't seen what you have there. Wasn't it what I objected to?
>
> (Court) Is that what you showed Mr. Lake?
>
> (Mr. Bean) Your Honor, the first was a permit. I think he has one—
>
> (Court) The objection was sustained because the permit showed the state owned a 40 foot right of way, but the objection to the certifications of the State Road Commission will be marked Defendants Ex. D, and will be sustained." (p. 75)

But in spite of these and former objections, defendant's counsel affirmatively asserted a 40 foot right of way of state and 10 feet for alley which will be discussed in the consideration of the defendant's prayers 3, 4, and 7 in which the court wiped out all of these sustained objections and his assertions: "prove your title by deed" (p 75). "The only title in that 40 foot of land is in the Lee" (Lakes). There is no question as to plaintiffs' ownership in that land (p. 90), and the stipulation (p. 1). No proof of title yet in state (pp. 114, 115), next to last page of section one of transcript of testimony, no proof of title in that 40 foot of land in the state, town, or defendant (pp. 90, 49). Motion overruled: "Because the plaintiffs have shown that it has been no easement by State Road Commission or by the defendant company, or its predecessor in title in regard to any easement or right of way over this property by gift, deed, or condemnation (p. 51).

> "(Court) Q. [To Baker defendants surveyor] Did the court and jury understand you to say the survey you made based on 1878 deed did not include any portion of present 40 foot right of way? A. I wouldn't be able to establish that because I couldn't find the stone (e.g. This was nearing end of trial). What did this statement do to all the 40 foot right of way he [Baker and Counsel Bean] referred to, the last statement confirmed his first statements to Mr. Bean." [plan for proposed road].

Bean showed him Plaintiffs' Ex. 4, State Road 1929 survey, filed by the State Road in record office (p. 79).

> (p. 80) "Q. —Tell the court and jury what that document exposes with reference to highway in front of Lake property. A. —it shows the plan which is supposed to be the construction line in front of the Lake property."

Bean asked:

"What does state road map show in reference to highway in front of Lake property? A. It shows the plan of the road to be constructed past the Lee property and through the main street of Wardensville.

Q. What width does plan show of highway in front of Lake property? A. About 40 feet.

(p. 81) (Court) 1918 plat does not prove or disprove title.

(p. 82) Q. Did you make a survey of 40 foot street? Objected.

(Court) When you could not find stone, what did you do? (p. 82) A. I used the *side line of the highway and I relocated the side line of highway and used that as the base line to measure.*

Object.

(p. 83) Q. I believe you found that all the poles were in the 40 foot right of way.

(Lake) Object.

(Court) Overruled (p. 83).

Q. Did you make a survey of that alley? A. I did, sir.

Q. Did you find the poles to be within the alley or outside? A. According to my line they were on the outside (p. 84).

Q. Then according to the survey you made and the work that you did the electric poles were within the 40 foot right of way in the alley. (p. 84) A. Yes sir." (a brutal deliberate contradiction forced on the witness.) (p. 84)

This was such an abuse that the court of its own motion said:

"Gentlemen, I think you have to use the word alleged alley, because no alley has as yet been established (p. 84).

(Mr. Bean) Mr. Lake testified alley had been there since 1918.

(p. 85) (Lake) I said alley, lane or drain. But I said it belonged to the Lees [Lakes].

(Court) Q. Did you make a plat of the 1878 deed? A. Yes.

Q. How did plat fit into the picture that you are talking about? A. The plat of 1878 corresponded with the plat made 1918 when the lots were laid out.

No alley has been established" (p. 85).

(p. 86) "(Mr. Bean) Q. And you are prepared to state that the electric light poles are in the alley and in the 40 foot state highway.

(Lake) Object.

(Court) The question may be reworded because no state highway and alley have been established as being held by anyone.

(Mr. Bean) Q. As I understand you found all the poles to be within an alley and within the 40 foot road that you are speaking of. A. Yes, sir.

Q. The road is a primary highway. A. Yes, sir.

(Mr. Lake) What knowledge does he have to base that on?

A. I base the 40 foot by using the center line of the highway that is now in existence.

(p. 88) Q. . . . I asked you how you based it . . . you didn't put that line there 40 feet, did you? A. No, sir. It was established by the state road commission.

Q. You took it from the center line using the scale? A. Yes, sir.

Q. And when you did that you found and located 40 feet, didn't you? A. The 40 foot road was located originally by the state road commission in 1929.

(Mr. Lake) I object because he said it was located by someone else and not by himself but by state road commission.

(Court) He simply stated what he found out by the location of the road. That doesn't prove or disprove the title. 'Proceed'.

A. The boundary of state road was relocated by me from the center line of the present highway using the center line marker or stations that had been put in there by state road commission and identified to me—

Q. When you say identified to me by state road commission, you don't mean from Charleston? A. Well, their representative.

(p. 90) Q. And that is the basis of your answers about the state road? A. Yes, sir.

(Mr. Lake) I ask that it be stricken out because it is based on somebody else.

(Court) It is understood that this testimony does not prove or disprove title to the state road commission, it should be referred to as alleged right of way of state road commission. What this witness is testifying to is the physical location of the present road, and it is not being referred to to prove title to the State Road Commission. If the State Road Commission does not own the 40 foot right of way, that is another thing, if it does own it that is something else, but yet there has been no evidence before this court and jury as to who owns that 40 feet of land but the Lakes."

Such rulings as these and there are many before and after, by a court are not due process of law nor equal protection, for every lawyer of any experience in court know these questions are leading and some were deliberately so, some carried implications and were strongly suggestive of desired answers and that the statement that they did not prove or disprove title did not cure the harm they did the plaintiffs, title being the real matter in dispute, it was also a departure from the form the pleading took by the stipulation of title in the plaintiffs that was admitted, saying it did not prove or disprove title. The defendant was trying to make the jury think the state had a right of way in that 40 feet which is objectionable as a conclusion of law, which was certainly improper, so where does the "disprove" come in?

The stipulation described the plaintiffs' title and that was all the plaintiffs were claiming. This case is to force the defendant to get off plaintiffs 13 feet of boundary along the state road. The way defendant's attorney worded his questions could have very easily misled the jury into doubting the meaning of the stipulation, and possibly putting the stipulation in the discards, epecially as counsel for the defendant totally disregarded the court's ruling and persistently termed it a right of way or title in the state until the last. The plaintiffs say the verdict of the jury indicates this to be so.

The judge's failure to instruct counsel to stop it was certainly a federal constitutional error. Especially is this so in view of the defendant's 3, 4 and 7 prayers being granted. They submitted to the jury if they find state has a 40 foot right of way they must find for the defendant. (Yet the judge until the moment said the only title was the Lakes, *supra.*)

Returning to the 1918 plat and what the defendant says is a 40 foot right of way or street in front of plaintiffs property: This statement contradicts the state's official record of 1929 (eleven years later), when the state had the road surveyed. Which of the two surveys would prevail, the state survey or the private plat showing a street which the state, eleven years later, says is a 14 foot pike? I call your Honors' attention to the opinion of Judge Browning "... the state road survey shows the Hardy Winchester pike to have a width of 14 feet, there is no record that the state acquires any larger width."

The attitude of the defense counsel has been to ignore the court's ruling on the state's title and its stipulation of title and their witnesses admission of trespass.

The defendant is concerned with two courses, the front, by the side of the Hardy Winchester pike and the Alley, the center of the drain. These have been the boundary lines for that property for over 100 years and 90 years in Mrs. Lake's immediate family, holding, using, occupying and paying taxes. Mr. Baker when he could not find the stone said he used the side of the road, 1878 deed survey. Every deed for miles around have referred to the pike as a description. It is incredible that defendant should follow such an incredible defense and drag the lower court into it, in the face of defendant's own admission of trespass.

Defendant's Admission of Trespass

Mr. Baker surveyor:

"Q. (Mr. Bean) What does the 1929 state road survey show? A. Well it shows the plan which is supposed to be the construction line in the front of the Lake property." (p. 79)

"A. It shows the plan of the road to be constructed pass the Lee property and through the main street of Wardensville." (p. 80)

(Court on objection of plaintiffs) ". . . As far as the width of the road and the width of the alley and the title and ownership of the road has not been established yet." (p. 83)

"A. The boundaries of the state road were relocated by me from the center line of the present highway using the center line markers.

(Mr. Lake) . . . you constantly refer to the road in front of the Lakes property as a forty foot right of way now will you tell the jury what you base that on? (p. 87) Now what do you base that 40 foot on? A. I based the 40 foot by using the center line of the highway that is now in existence.

Q. Did you put it there or not Mr. Baker? A. No, sir. It was put there, the 40 foot right of way was established by the state road commission.

Q. You took it from the center line using the scale, didn't you? A. No, sir, I used the center line—

Q. —And when you did that you found and located where forty feet was didn't you? A. Yes, sir, from the—" (p. 88).

"A. The 40 foot road was located originally by the state road commission in 1929.

(Mr. Lake) I object because he says it was located by someone else. . . ."

"A. The boundaries of the state road were relocated by me from the center line of the present highway using the center line markers or stations that had been put there previously by the state road commission and identified to me by the state road commission."

"A. Well their representatives." (p. 89)

Q. And that is the basis of your answers about the state road? A. Yes, sir.

(Mr. Lake) Your Honor I ask that all of that be stricken out. . . .

(Court) It is understood that the testimony does not prove or disprove little to the state road commission. . . . but yet there has been no evidence before this court and jury as to who owns that 40 feet of land but the Lakes."

The plaintiffs ask this Court to remember that the alleged 40 foot covers 13 feet of the plaintiffs' land, which is the alleged location on the front of plaintiffs land by the side of the Hardy Winchester pike on which the defendant's equipment is lodged, and is within the description of the Lake property in the complaint stipulated by the defendant as being owned by the Lakes (p. 90).

"(Court) Did all these lots check out according to the descriptions in the deed? A. Fairly well, yes, sir." (p. 92) (1878 deed)

"(Mr. Lake) (p. 95) Q. Does your survey show that the line of the property under the deed in 1878 to Mr.

Baker that the boundary line of that deed was fixed at the Hardy Winchester pike and that that land he bought bounded on that description or that line, is that right? A. The line runs from the stone toward Trout Run along with the pike."

(Mr. Bean) (p. 98) Q. I ask you now if you ran off the Lake lots and found what they had what their deed called for? A. Yes, sir.

(Mr. Lake) Q. And yet you did not find the stone where all the deeds refer to, every one . . .? A. Yes, sir.

(Mr. Lake) Q. Mr. Baker the northerly line (1918 plat) here of what you say reflects the boundary of the right of way, is there anything on that map that says it is a state right of way? (p. 100) A. It called it on the map Main Street.

Q. I asked you Mr. Baker if there is anything on that map that says it is a state right of way.

Can you say yes or no?

Q. Is there anything there. . . . A. It is a right of way. It is called Main Street.

Q. Why do you say it is a right of way, is there anything that says right of way? A. Well it says Main Street. (p. 101)

Q. But does it say right of way? A. No, sir.

Q. It does not. Is there anything on your chart, on your plat, that says right of way? A. No, sir.

Mr. Bean:

(part two of transcript of the testimony at 2, p. 13)

Q. Some new evidence was introduced in the form of two photographs, marked Plaintiffs Exhibits 'O' and 'P'. I now hand you these two photographs and ask you if you can recognize the property shown thereon? A. Yes, sir I can.

Q. Do you see the one pole shown there? A. Yes sir.

Q. In your testimony — you said that when you measured from the center of the highway you found all poles within 20 feet of the center line.

Q. In your prior testimony you stated you had measured from the center line of the highway and found the power poles in front of the Lake property within the area of 20 feet center line of the highway . . .? A. I said the poles were within the 20 foot line of the center of the right of way line of the highway on the north side of the highway.

Q. (Mr. Bean) Mr. Baker the pole shown on these two photographs, is that one of the poles you testified about? A. . . . it is one of the poles I checked. (2, p. 14)

(Mr. Lake) Q. Mr. Baker. Where is that pole? A. It is on the frontage of your property on Route 55, looking toward Wardensville, looking east." (2, p. 16)

Summary of R. W. Baker testimony

The plaintiffs say that Mr. Baker has testified for the Plaintiffs that the 1929 survey of the state road was a proposed plan for a road to have a 40 foot width, the 40 foot width was established by the state road commission survey of 1929, he said that was the bases of what he said about the state road (p. 90). Everything the Court said about title was "the only title in that 40 foot road was the Lakes" but your Honors this is but a small part of this proof; but it is the whole truth: It is backed up by the stipulated title, the plaintiffs' deeds, the state road survey of 1929.

The 14 foot pike survey, 1929, interpreted by Mr. Baker and Col. French, U.S. Army, retired Engineers, Mr. Bramble, Clerk of the Court and keeper of the County records, the laws of the State Code, sec. 1461 (5) and the fact for 90 years the title of this land was in the immediate family of the plaintiffs, claimed, used, held, and occupied adversely to all others and paid taxes, and finally the announcements of the judge of the circuit court over a dozen times that the only title of that property before this court and jury was the Lakes. The Supreme Court of Appeals of W. Va. supra, said "the 1929 state road survey showed

the Hardy Winchester Pike had a width of 14 feet, there is no record that the state had acquired a larger width.

HAMMON, Company Executive admits trespass:

Mr. Hammon (p. 107), Defendant executive, Manager of Power Production:

He and Mr. Norris installed the power equipment in 1937.

"(Mr. Bean) (p. 109) Q. State whether or not you contemplated putting those poles on the Lake property? A. Yes, we did.

* * * * * *

Q. Did you obtain permission to put them on the Lake property? A. No we didn't.

Q. What did you do then? A. I contacted a state highway man in Moorefield and with him and a set of road plans we came to Wardensville and located the center line of the roadway from Trout Run back on into Wardensville, approximately, I would say to the southeast corner of the Lee property and when we did that we measured from the center line 20 feet over and set the stakes for the poles . . . less than 20 feet from the center line of the road."

(Argument: This shows ½ of 14 ft. pike, 7 feet and 13 feet on Lake or Lee property trespassed on)

"Q. I now ask you if you and your company have maintained those poles in their present position from that date to the present time? A. Yes, sir we have.

Q. What position has the company taken with reference to their right to maintain their poles there? A. We have the poles there, we have had them there since 1937, and we have obligations to our customers which prevents their removal and we do not plan to do so.

Q. Have you refused to remove them? A. Yes, sir.

(Mr. Lake) (p. 109) Q. . . . if you didn't know the road by that (name) how did you find the center line to where you found the 20 foot point on the Lake

property? A. By utilizing the W. Va. plans for that road from Wardensville to Baker (1929).

A. (p. 115) We maintain our power lines, yes, sir.

Q. And that includes cutting away and moving and cutting away and trimming any plants and shrubbery that might come in contact with it?"

NORRIS, Superintendent of line construction:

Mr. Norris, was line superintendent for company in charge of construction, Wardensville was in my division.

(p. 67) On cross examination by Mr. Lake:

"Q. Have you ever searched the records, the land records, to ascertain who owned that property in that neighborhood?

(Mr. Bean) Objected.

(Court) Overruled.

(Mr. Bean) We stipulated that Mrs. Lake owned the property.

A. Now there was no occasion for me as line superintendent to investigate who the property owners were.

Q. You don't know whether the property belonged to Mrs. Lake when you put those poles on that property or not, do you? A. Mr. Lake, I knew that Mrs. Lake owned that property but as far as I was concerned or advised at the time that the place where we put the poles was on the state right of way just adjoining the Lake property.

Q. Why do you continue to say you put it on the state right of way? I mean do you have any substantial thing that you can tell the jury to support that? A. On the information we got from the state highway department, they maintained that they owned the 40 foot right of way along your property and there is where we put our poles.

(p. 7[illegible]) . . . Q. Well now the state road has nothing to do with the alley, does it? A. I would not know Mr. Lake.

Q. Well you discussed with them the situation and there were four poles involved and you mean you had a discussion with them and asked them about the two poles on the property and the poles on the alley you didn't pay any attention to? A. Well their discussion was of course, on the state right of way and that is what I discussed with them.

Q. That's all? A. On the state right of way, yes, sir.

Q. The only information you got about the state right of way was from some clerk or whom you discussed it with of the state road or your company, isn't that right? A. Absolutely not. I got my information from highway engineers" (p. 73).

The plaintiffs say that all these references to right of way and titles are conclusions of law and are not evidential in themselves and the court should not have permitted them as substitutes for facts.

MR. JORDAN, lived on drain or alley, twice Mayor of town:

Mr. Jordan (p. 51) Two terms mayor of Wardensville:

"(Mr. Bean) Q. Are you familiar with the alley adjoins Lake property? A. Yes. I own property along the alley.

Q. State whether or not the Town of Wardensville has maintained that alley as a public alley . . . and how long? A. Over twenty years.

Q. . . . do you or not know whether the town of Wardensville had expended money and labor and material on that alley? A. Yes.

Q. State who uses that alley. A. General public.

Q. (p. 53) What use have you made of that alley? A. Well, just to get in and out of my garage is all.

(Mr. Lake) Q. Your property is known as Lot No. 1, is it not? (p. 54) A. Yes, sir.

(p. 55) Q. Did you ever hear of the Baker line? A. No, sir.

Q. That's Mrs. Lake's grandfather. Did you know that he owned that property next to your property? Isn't that right? A. Yes, sir.

Q. And your property and his property abutted each other, do they not? A. Not in my time.

Q. Well if they don't abut what property is between the two? A. The alley.

A. I made the statement that they maintained the property of the alley.

Q. They have never taken it over then, is that right.

Q. Do you know anything about the tile going down the alley? (p. 56) A. You know that . ... maybe a dozen times has broken down?

A. Yes, sir.

Q. Do you want to indicate or want the jury to understand that the town owns that lot?

Q. Does the town own the lot or alley? A. No, sir.

Q. The repairs that were made on it, were they made during your administration? When you were mayor?

Q. You made those repairs and you do not know who owned the lot, the alley? A. Well the town used it and they always kept it up.

(p. 57) Q. Do you think the town would be responsible if anyone got hurt in consequence of those break downs? A. No.

Q. You don't know who would be responsible? A. No.

(p. 58) Q. Now, in 1914 there was no alley there, it was just a ditch, wasn't it? A. That ditch was 6 to 8 feet wide and 2 feet deep.

Q. Now the water shed over that side of the mountain came down to the old trad, got in that ditch and went on down to Trout Run, is that right? A. Yes, sir.

(p. 59) Q. . . . in rainy weather what did you say about the ditch . . .? A. The ditch filled up in the spring.

Q. The water came down there very rapidly didn't it? A. Yes.

Q. Now would it have been possible to have put a fence in that ditch? A. No, sir.

Q. It would have washed out, wouldn't it? A. Practically, yes.

(p. 62) Q. (Speaking of the ditch) Could you say it belonged to Mrs. Lake's father, I mean grandfather? A. No. I couldn't say."

If this seems to have been overly lengthy it was because this ditch was really a natural water shed or way and was not susceptible of the will of anyone to be disturbed or interfered with and was permanent in its nature ever since prior to 1878, and still is.

MR. GAMBLE, Clerk of Courts of Hardy, keeper of the records.

Mr. Robert Gamble, the clerk of the Circuit Court for Hardy County, keeper of the County records, a totally disinterested witness, stated that the records of his office, which he had thoroughly searched showed Mrs. Lake's title to her property (p. 49) "As I recall there has been no out sales, no right of way, no condemnation, no gift or any part of it, and the property as originally deeded was still intact as far as the records were concerned." When Mr. Gamble said it was still intact as of the day it was filed, having searched the records, it was the equivalent of confirming the defendant's stipulation of title because the first and eighth line of description of the 1878 deed were identical with the side of the pike and the stone in the drain by the side of the pike, and is the equivalent of saying that the 20 feet of land from the center line of the pike extended 13 feet over plaintiffs land, which point was where Baker, Hammon and Norris said defendant's poles and equipment was on plaintiffs' lawn.

As to the alley, the defendant has offered no evidence to show that its equipment is not within the center line of the drain. Their only reference was to a fence, which carried no meaning, and by referring to it as a public alley for a period of years. The Court will find no reference to any law "of a period of years" having any significance, but to the U. S. 5th and 14th Amendments, and West Virginia Code, sec. 1461(5) says condemnation, etc.

The plaintiffs feel that the foregoing sustains their assurance given the court above: Mr. Baker, Hammon, Norris, Jordan and Gamble. Those that referred to the state highway or state road as 40 feet, admitted that they got their information from the employees of the state road commission in the local area and the 1929 State Road survey. The 1918 plat offered in evidence by the defendant was excluded on plaintiffs' objection (p. 74, 75), but this plat was not a part of the defendant's stipulation under "as described in plaintiffs' admission of plaintiffs title as owned. But the court's ruling did not deter defendant's counsel from using and referring to it during the remainder of the trial.

Surveyor Baker said the pole he measured was within 20 feet of the center line of the road, is on owners' (plaintiffs) property. Mr. Hammon said Defendant asked the plaintiffs for permission to install its property on her land but that she refused to grant it so he went ahead and measured the 20 feet set the stakes and poles within that distance, and that the defendant had maintained them there ever since and that the defendant has refused to remove them, Mr. Norris said on cross examination:

> "Mr. Lake, I knew that Mrs. Lake owned that property but as far as I was concerned or *was advised at the time* that the place we set the poles was on the state right-of-way adjoining the Lake property.

Q. Why do you continue to say that you put the poles on the state road property? A. On the information we got from that state highway man. (p. 68).

Q. The only information you got about the right-of-way of the state was from some clerk or whoever you discussed this with . . . is that right? A. Absolutely not, I took my information from the highway engineer."

The important fact is, the defendant's property is still on the plaintiffs' land against their will:

The Court will bear in mind the improper evidence the lower court permitted the defendant and its witnesses to give defense counsel and his witnesses, by a strange coincidence, always referred to the 14 foot state road as a 40 foot highway or right-of-way although the court warned defense counsel they should say "alleged state right of way, which plaintiffs say is still wrong, and that this character of evidence should have been barred. The laws of West Virginia are specific on the conveyancing of real property which are wise, reasonable and recognized methods necessary to the guaranteeing security in property.

But this is no defense to trespass is further backed up by the over three dozen assurances from Judge Muntzing and defense counsel, Mr. Bean, assuring the plaintiffs that Mrs. Lake owned the property, that there was no question about the ownership, that there was no evidence before the judge and jury of who owned that 40 foot of land but the Lakes, that there was no evidence of any title to that land in the state, town or defendant.

These references are fully set out in the first eleven pages of the plaintiffs' petition praying the Supreme Court of Appeals of West Virginia to review the court's refusal to grant the plaintiffs' request for an appeal.

As previously noted, the verdict and judgment of the trial court, takes plaintiffs' land contrary to the Federal 5th and 14th Amendments and Art. 3, Secs. 9 and 10, West Virginia Constitution.

Plaintiffs' Prayers For Instructed Verdict

The court will remember that over 36 times, Judge Muntzing and Mr. Bean vouched the defendant's stipulation that plaintiffs owned the land described in their complaint, that each of the defendant's witnesses admitted the defendant's equipment was on the land of the plaintiffs and identified the land from pictures showing the defendant's equipment on it *(supra)* and by their measurement from the center line of the pike to within 20 feet to the pole, Mr. Baker, Hammon and Norris, bolstered by the defendant's stipulation of plaintiffs' title to the land, and the Appellate State Court decree that State had not acquired any additional land.

The Court will note that no reference is given to any facts, statute or record necessary to the conveyance of real property, and the special requisites of land acquired by the State Road, Section 1461(5), 1462(6), 1463(7) and 1464(8) (all are absent) but the defendant's counsel (p. 1) stipulated that the plaintiffs own the land described in their amended bill of complaint.

Two sides of this triangular lot is effected, as happens, they are the courses and objects of that part of the land on which defendant is trespassing and are part of the two original lines of the whole tract, to wit: Beginning at a large stone in the center of a drain by the side of the pike, thence N. 77 degrees W. 00 feet by the side of the pike to . . . the other line starting at a point (the 8th line) S. 41½ degrees E. in the center or a drain to the place of beginning.

That drain and the side of that pike are as visible today as they have been for over 100 years, 90 of which have been

in the plaintiffs immediate family (1878). Mrs. Lake owned, used, occupied and was known as the owner since 1937 and paid the taxes, and now defendant is trying to take it free, gratis.

The plaintiffs say when the defendant stipulated the plaintiffs owned the property, Nov. 29, 1966, they had used it since 1937 and knew that their equipment was on it, as they admitted under oath at the trial.

With all this before the lower court, the defendant comes in with no proof, legal or moral, and sets up a claim on use and right-of-way with no reference to any law and in direct contradiction to his own witnesses, who said that is the plaintiffs' land and the equipment on it is the defendant's, and it refuses to remove it.

That defendant offered no evidence of any recognized methods of acquiring and conveying real estate by or to government. (Code, W. Va., 1461(5) and 1462(6) or 1463(7). That defense counsel ignored the opinion of the Supreme Court of Appeals of West Virginia in the first appeal in this case 149 S.E. 230, stating the State Road blue print (survey 1929) showed the Hardy Winchester pike had a width of 14 feet, there is no record that the State has acquired any greater width.

Yet with all of these facts the defendant offered its prayers Nos. 3, 4 and 7 which the court granted all three of them submitting to the jurors, if they find the State road has a 40 foot right of way in front of plaintiffs' land and all of its equipment is on it their verdict must be for the defendant (the only difference is in the alley prayer which they fix a right-of-way of 10 feet).

Defendant's No. 7 prayer assumes that the 1918 plat known as West Riverview Addition to the Town of War-

densville, which defendant asserts sets forth a street or highway on which the plaintiffs lots front said highway being 40 feet wide and also shows an alley 16 feet wide and public funds have been spent on the 40 foot highway and expended on the alley for 10 years if the jury finds, then the plaintiffs in law are estopped from taking the position that the highway, 40 ft. wide and the alley 16 feet do not exist. If the jury further believe from the evidence that defendant's equipment is within the 40 ft. right of way and 16 ft. alley, "then the jury may return a verdict for the defendant in this case."

The plaintiffs think it is foolish to try to dissect such a mixed up mass of words; nevertheless a few things may be called to the court's attention: (1) Mr. Jordan, twice mayor and lived for years on this drain, point blankly, said the town does not own the alley and would not be responsible for it, Councilman Ormdorff said nobody seemed to have any interest in the alley so town council dropped it; (2) To refer to the plat, West Riverview Addition to the Town of Wardensville, which is dated 1918, pages 74 and 75 of transcript of evidence shows Judge Muntzing on objection refused to accept the paper in evidence, but this did not make any difference to defense Counsel. He used it; (3) The Stipulation specifically confined the plaintiffs' land to the "as described in plaintiffs' amended bill of complaint", there is no mention of this described plat of 1918; (4) Finally, Mr. Bean asserted to the court that he had no intention of using plat to prove title, and (5) What evidence does he have and what law does he refer to (he usually says the statutes of W. Va.

The prayer is hopelessly bad because it has no evidence to support it and is so confused that what it tries to accomplish is obscured, "by if the jury further believes."

The plaintiffs say out of the defendant's own mouth it has boldly, and illegally held by promises and subterfuges and now by wishful thinking of facts and laws the plaintiffs' land with no support.

The one thing that stands between the plaintiffs completely losing their property without just compensation, due process and equal protection of the law is the 5th and 14th Amendments to the constitution of the United States.

Prayers

The plaintiffs, at the conclusion of the testimony moved the court to instruct the jury to award the plaintiffs a verdict, Court refused, Second part of testimony (2, p. 22), which the plaintiffs argued to the Court based on the 5th and 14th Amendments.

The plaintiffs say their prayers Nos. 3 and 4 asking for an instructed verdict should have been granted.

The court cannot justify his dozen and more rulings as appears in the plaintiffs' petition for an appeal to the Appellate Court of West Virginia and the Supplemented Brief and the Brief for Reconsideration, all refused, yet the rulings of the lower court were clear and condusive and emanated with the defendant's stipulation "that plaintiffs own the property described in their amended bill of complaint as described therein." "There is no evidence before this court and jury as to who owns the 40 foot of land but the Lees" (Mrs. Lake was a Miss Lee): There is no evidence that the State, Town or defendant has any title in that land: The only title in that land is the Lees: Objection sustained, prove your title by deed: The ownership of the alley and the 40 foot right-of-way in the pike has not been established: The next to the last page of the testimony in the first section (p. 114) on objection of plaintiff, "The

testimony may stay in regard to the explanation why they laid the poles within the 40 feet alleged right-of-way. That does not prove or disprove who owns the right-of-way, yet. If the State Road Commission doesn't own this 40 feet right-of-way that is another question. If it does own it that is something else, but yet, there has been no evidence before this Court and jury as to who owns that 40 feet of land except the Lakes." (p. 90) As far as the width of the road and the alley and title and ownership of the road has not been established yet.

The following is a page reference to additional instances: (pp. 48, 67, 33, 45, 75, 90, 94, 51, 92, 95, 86, 77, 81, 83, 89, 106, 115.)

The plaintiffs feel that the whole record shows the defense has been a strained effort and that from some unaccountable reason the jury should have brought in a verdict so completely at variance with the whole testimony plaintiffs and defendant's, because the plaintiffs and defendant's testimony on all material points in the case put the finger on the defendant's whole course from the defense counsel question of the defendant's ranking officer to testify, "Did you contemplate putting your poles on the Lake property? Yes, we did. Did you get permission? No, we didn't. What did you do then? We measured 20 feet from center of road and set the poles. Have you maintained them there ever since (1937)? Yes. Have you refused to move them? Yes, we have."

The trend has been the same that the defendant from the beginning has been a trespasser and the verdict of the jury on which the court entered judgment that took plaintiffs' land, contrary to the evidence, without just compensation, due process of law and equal protection of law, directly contrary to the U. S. Constitution.

The plaintiffs respectfully submit that to carry out the intent and purpose of this guarantee, the lower court should have granted the plaintiffs' motion and prayers Nos. 5 and 8 and refused defendants prayers Nos. 3 and 4.

Respectfully submitted,

LEWIS W. LAKE,

Wardensville, West Virginia 26851
For Appellants.